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Supreme Court of the United States

OCTOBER TERM, 1937

No. 594

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

CHARLES W. TAYLOR,

Respondent.

BRIEF ON BEHALF OF PETITIONER ON WRIT OF CERTIORARI

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I.

The Opinions of the Courts Below.

This is a review, on writ of certiorari, of a decision in admiralty of the United States Circuit Court of Appeals for the Third Circuit.

The opinion of the District Court for the Eastern District of Pennsylvania, was rendered on December 4, 1936, and is printed at pages 305-15 of the record. It has not been printed in the reports.

The opinion of the Circuit Court of Appeals for the Third Circuit, affirming the decision of the District Court, was rendered on September 8, 1937, and is printed at pages 326-31 of the record. It is reported in 92 F. (2d) 84.

II.

Jurisdiction.

This case is within the admiralty and maritime jurisdiction of the United States and of this Honorable Court. The jurisdiction of this Court was invoked by a petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, which was granted on January 3, 1938.

III.

Statement of the Case.

The suit was brought by respondent, a seaman, to recover damages and maintenance and cure for thrombo angiitis obliterans, commonly called Buerger's disease, alleged to have been contracted on the petitioner's steamship *Losmar* (R. 3-5, 306). Both the District Court and the Circuit Court of Appeals found that respondent's disease was not caused by any negligence of petitioner and held that he was not entitled to indemnity damages (R. 311-2, 315, 328); but they thought the disease was contracted while he was on the *Losmar* and allowed him maintenance for the remainder of his life.

Certiorari was granted to review the maintenance allowance, but a brief statement of all the evidence is necessary to a satisfactory understanding of the case and the decisions of the lower courts. As most of the facts upon which a proper maintenance and cure decision depend, however, are not in serious dispute, we will review separately the uncontroverted facts, the conflicting testimony of witnesses to the facts, and the medical opinions.

The Uncontroverted Facts.

Petitioner is a Delaware corporation engaged in intercoastal water transportation, and owned and operated the steamship *Losmar* (R. 3, 7, 314). Respondent was a fireman on the *Losmar* when his disease became apparent (R. 3, 7, 19, 314).

On February 3, 1935, the *Losmar* went into a shipyard at Sparrows Point, Maryland, for regular trip repairs (R. 34, 154, 162, 188, 211-12, 216-7, 307), and the crew were paid off on February 4, but respondent remained on board, on shore pay, while the repairs were being made (R. 35).

On February 11, respondent went to the Marine Hospital at Baltimore, where he had some teeth extracted and received medication for his right foot (R. 24, 33, 35-7, 218, Exh. L-1, 290-1), after which he returned to the ship and continued his regular work (R. 36). The clinical abstract from that hospital states that he complained of an "inflammatory lesion between the 4th and 5th toes" for which the medication was prescribed. The diagnosis, aside from dental, was "ringworm, right foot" (Exh. L-1, 291).

A few days later respondent again went to the Baltimore Marine Hospital, where they extracted the rest of his teeth (R. 36, 219, Exh. L-1, 291), and he then returned to the *Losmar* and continued his work (R. 37). The hospital abstract does not make any reference to a different condition of his foot on this second date, but states that he did not return for further treatment or examination after February 16 (Exh. L-1, 290-1).

Respondent sailed on the *Losmar* under coastwise articles on February 24 (R. 154, 212), arriving at Philadelphia on February 26 (R. 154, 189, 217). Two days later, February 28 (Exh. R-3, 304-5), he went to the Public Health Service Relief Station, where his condition was diagnosed as boils on the left forearm and neck, and "epidermophytosis, toes of both feet" (R. 37, 38, Exh. R-3, 304). Epidermophytosis is a fungus infection often found in chronic inflammatory diseases of the skin.

Subsequent to his visit to the Relief Station in Philadelphia, he signed articles for an intercoastal voyage of the *Losmar* (R. 39), sailing on her from Philadelphia on March 3 (R. 154, 217), and continuing to stand his watches. A few days out the steward, who attended illness or injury on the ship (R. 25, 228, 233-4), treated his foot and continued treating it until the ship arrived at the Panama Canal (R. 26, 220-3, 224-5). Sometime on this voyage, respondent cut off the front upper part of his right shoe to relieve his toes (R. 179, 199, 225-6).

The ship arrived at Colon, Panama Canal, on the evening of March 11, and around 12:30 P. M. the next day, he was taken to Gorgas Hospital, Balboa Heights (R. 157-8, 191, 217). His foot ailment was there diagnosed as "osteomyelitis, chronic, proximal phalanx right fifth toe with draining sinus" (R. 292). His condition upon admission to the hospital was reported as follows:

> "Toes and dorsum of right foot swollen and tender. Skin broken between little toe and fourth toe. The cracked skin between fourth and fifth toes indicated a sinus which extended downward apparently into the metatarso-phalangeal joint" (Exh. L-2, 292).

The abstract from his clinical record there gives the following history "as elicited from patient":

> "About February 25, 1935, right foot became sore beneath toes. Skin between fourth toe and little toe cracked. Three days before admission to hospital right foot became swollen and very painful" (Exh. L-2, 292).

On March 27, the fifth toe on his right foot was amputated (R. 292). He remained at the hospital under treatment until May 4, when he returned to the United States on petitioner's steamship *Alamar,* arriving at New York and entering the Marine Hospital at Ellis Island on May 13 (R. 28, 43-5, Exh. L-2, 291, Exh. L-3, 293). At Ellis Island his disease was diagnosed as thrombo angiitis obliterans (R. 293), commonly called Buerger's Disease, and his right fifth toe was re-amputated, and later the fourth toe was removed (R. 294). He continued to receive hospital care at Ellis Island until August 7, when he was transferred to the Marine Hospital at Stapleton, Staten Island, New York (R. 29, Exh. L-3, 293, Exh. L-4, 293-4).

The abstract from respondent's clinical record at the Stapleton Marine Hospital gave the following history:

> "Patient states that in February, 1935, he reported to Marine Hospital, Philadelphia with a small crack in base of little toe. Crack increased in size, and in March webbing split between 4th and 5th toes" (Exh. L-4, 294).

While at Stapleton respondent asked to have a specialist sent to the hospital to examine him, and petitioner engaged Dr. Harry V. Spaulding, Director of Surgery at Broad Street Hospital, in New York City (R. 131), to go to Stapleton for that purpose (R. 47-8, 131-3, 280, 284), at petitioner's expense (R. 287). Dr. Spaulding did examine him on August 28, 1935, and confirmed the diagnoses of the Marine Hospital doctors and recommended that the leg be amputated (R. 48, 132).

Respondent's right leg was amputated below the knee on September 6, and he remained at the hospital until October 3, when he was discharged to the "Outpatient Department to return at intervals for re-examination, and later to be fitted with artificial limb" (R. 29-30, 75, Exh. L-4, 293-5). Late in December, 1935, he was fitted for an artificial leg, which was supplied to him on January 15, 1936 (R. 30).

During the time respondent was at the Marine Hospitals on Ellis Island and at Stapleton, May 13 to October 3, he either was unable, or unwilling, to tell how or where he contracted the ailment (R. 47, 49, 132, 271, 277-8). Nevertheless, petitioner gave him small sums of money every week (R. 45, Exh. R-1, 295-303), even though he had no expenses of maintenance or cure at the various hospitals. Petitioner continued making regular payments to him after he was discharged as an in-patient at Stapleton, and up to March 10, 1936, giving him a total of $487 (R. 45-6, 314, Exh. R-1, 295-303). At that time he voluntarily stopped accepting payments and engaged attorneys to sue petitioner for damages (R. 281). The libel was filed on March 24, 1936 (R. 1).

The Conflicting Factual Evidence.

The testimony in regard to occurrences on the *Losmar* before respondent was taken to Gorgas Hospital does not have a very important bearing on the question of law under review, but some of the medical opinions were based on it and it is necessary to an understanding of the whole case.

Respondent testified that shortly after 4:00 P. M. on February 9, 1935 (the libel alleged, and his witness Aarosson testified, that it was the 11th), as he stepped into the boiler room from the passageway between the starboard and center boilers, the lights flickered and went out (R. 19, 70-3); and, before he could stop, he walked into a pile of retarders lying about two feet to the left of the entrance to the boiler room, and directly in front of the center boiler (R. 21, 24).

The First Assistant Engineer (R. 170) and the Steward (R. 236) said the lights did not go out. All that day, the Third Assistant Engineer had one of the ship's two generators apart overhauling it (R. 241-2, 248, 249), and he stated that there was no change from one generator to the other (R. 250), nor from ship's steam to compressed air, or *vice versa* (R. 243-4).

The Chief Engineer (R. 192), First Assistant Engineer (R. 166), and the Second Assistant Engineer (R. 180, 183-4) all testified that the claimed accident was impossible because the retarders were *in* the center boiler at that time, and were *not taken out until February 11th,* two days after respondent claims to have stubbed his toe on them.

The Chief and First Assistant were not limited in their testimony to their bare memories, but were able to refresh their recollection *of the exact date* the retarders were removed from the boiler by their work book which showed what work was done in the engine room on various days (R. 172, 191-2, 197-8, 206).

The Second Assistant, although assigned to the ship on February 9, did not go on board and commence work until

February 11 (R. 173, 177, 180, 184). When he went on duty that morning the retarders were still in the center boiler (R. 183), and work was started on that boiler after he reported for duty. He had definite knowledge, from the commencement of his work on the *Losmar*, that they started to take the retarders out of the center boiler on February 11 (R. 180) and that they could not have been out before that day.

When actually removed from the boiler (on the 11th), the retarders were placed immediately in front of it (R. 180, 192), but that would be about two feet to the left of the passageway from the engine room (R. 180), *exactly where respondent claimed they were on the 9th.*

Respondent said that to place the retarders close in front of the center boiler was improper, and that they should have been placed over against the bulkhead (R. 21-2, 31). The Chief Engineer (R. 192-3), the First Assistant (R. 166, 167), and the Second Assistant (R. 180-1, 186) all testified that the place where the retarders were in front of the center boiler on February 11, and the place where respondent claims they were on February 9, is the customary and proper place to put them, and the Court so found (R. 328). These witnesses said the retarders could not properly be placed at the bulkhead because of pipes and valves, and their being there would interfere with the working of the ship (R. 168-9, 181, 193).

Respondent said that after he stubbed his toe he went up on deck and noticed that there were two engineers "changing the generators"; that "one generator had stopped," and they were "starting the other one up"; that he knew the generator was stopped because "the lights went out"; that when he got on deck, "they were working on the other generator trying to start it"; and that one of the generators "was connected with the compressed air line, * * * and they took the head off the generator and turned on the compressed air" (R. 20). The Third Assistant Engineer said he

was working on one of the generators (R. 241, 248, 249), having commenced on it February 8 (R. 250), and he did not finish until *after* February 9 (R. 248, 249); that it was apart being overhauled all day on the 9th (R. 248, 249) and neither did, nor could, supply any current (R. 241-2, 249-50); and that the other generator supplied the current the whole day (R. 242, 250).

Aarosson, a former utility man in the steward's department (R. 91, 94, 98), testified for respondent that the lights "were blinking and went dim and went out" (R. 92, 98-9) because the engineers were changing from steam to air (R. 93, 99). However, Aarosson was in the galley (R. 92, 98-9) and he was testifying about *February 11* (R. 93, 98), and respondent said it was not on February 11 that he stubbed his toe (R. 33). The Third Assistant Engineer, who was not in the galley, but was at the generator all day, said there was no change from steam to air, nor from air to steam (R. 243-4). Wenig, the assistant electrical foreman in the shipbuilding plant where the *Losmar* was moored, testified that the shipyard did not furnish either compressed air or electric current to the *Losmar* (R. 261-2). The First Assistant Engineer also said there was no change (R. 175).

Respondent testified that during the remainder of his watch he did not pay much attention to his foot, but after he went off duty at 8:00 P. M. he looked at it and saw that his little toe was "bruised and swollen" (R. 22); that the Steward was not on the ship (R. 22) and he asked Aarosson, the only man in the steward's department then on board, for something to put on his foot, saying that he had hurt it in the "fire hole," but Aarosson did not have anything for that purpose and suggested that respondent see the Captain (R. 23); and that he then went to see the Captain and found that neither he nor the Mate was aboard, so he went back and showed his foot to Aarosson (R. 23). He further testified that the next morning (Sunday), after coming off his watch, the Steward washed his foot with some solution and

bandaged it, he telling the Steward what had happened to him on the preceding afternoon in the boiler room (R. 23). The Steward denied that respondent *ever* told him of the claimed accident, and that he ever saw or treated respondent's foot, or knew anything about it, until about March 5 (R. 220-1, 224-5, 234).

Respondent said he stood his watch on Sunday night, and on Monday morning he went to the Chief Mate and asked for a certificate to go to the marine hospital and have his foot looked at. He said the Mate told him that the Captain was not aboard and he would have to wait, but suggested that he use his discharge for admission to the hospital (R. 23). The Chief Mate testified that the respondent never asked him for a certificate and he never heard or knew of respondent's foot trouble until two days before the *Losmar* reached the Panama Canal (R. 212-14).

Respondent went to the Baltimore Marine Hospital on the 11th, where they gave him some medicine, a blood test, a urinalysis, and extracted some of his teeth, after which they told him to go back to his ship (R. 24, 36). He said that *at that time* his "little toe was swollen and bruised and it was cut *on the side*" (R. 35). This is the first time referred to in the abstract from the Baltimore Marine Hospital, but that abstract does not show any swelling, bruising or cut, and it does report a "lesion" between the fourth and fifth toes (not on the side) (Exhibit L-1, 291).

Respondent testified that the appearance of his foot on the 11th as "swollen and bruised and * * * cut on the side" continued *"just a couple of days"* (R. 35).

He said that when he returned to the ship he reported to the Chief Engineer and First Assistant (R. 36). This was denied by both engineers, who stated that they never knew he had been to the hospital, nor that he had any trouble with his foot or toes, until some time in March when the vessel was on her way to the Canal (R. 163-4, 191).

Respondent said he went to the hospital again two or

three days later (R. 24, 36) "to get some more medicine" and while there they extracted the rest of his teeth and told him to go on with his work and continue using the medicine (R. 37). He testified that a day or two after the ship arrived at Philadelphia (R. 38), he asked the Chief Mate for a hospital certificate to get some treatment for his foot, and the Mate gave him one (R. 25-6, 37). This was denied by the Mate (R. 213). Respondent said he went to the Public Health Service Station in Philadelphia where they examined him all over and gave him more medicine and told him to continue on the ship (R. 25-6, 37). It was at this time that his ailment was diagnosed as a fungus infection known as epidermophytosis, on both feet (Exhibit R-3, 304). He did not produce any doctor from that station, did not *voluntarily* produce the abstract from there, and did not make it available either to his own expert witnesses or to petitioner's (R. 149-50).

It is interesting to note that respondent did not produce the testimony of a single doctor from the Public Health Service at Baltimore or Philadelphia, and his medical experts *found it necessary* to consider the Baltimore diagnosis wrong, and to ignore the Philadelphia diagnosis and not even use that abstract.

When the *Losmar* was a few days out from Philadelphia, he reported to the Steward, who thereafter treated his foot daily until arrival at the Canal (R. 26, 221-3, 224) on March 11 (R. 154, 157, 217). All witnesses agreed that respondent did report a foot infection at some time during the period of eight days between Philadelphia and the Canal. The Steward thought he first learned of it about March 5 (R. 220-1, 224), and he said that after respondent reported it to him, he made a report to the Captain (R. 233). Captain Jimmyer thought he first learned of the foot ailment on March 9 (R. 156, 158). All injuries and sickness are reported to the Captain (R. 94, 158) and he keeps a record of them, and his first record of respondent's foot ailment was

on March 9 (R. 160-1). He stated that at that time respondent told him he had been treating his foot for about six weeks (R. 156).

Chief Engineer Green testified that he first learned of the foot trouble on March 8 or 9 (R. 189-91) when he noticed respondent's shoe cut open. He asked what was the matter and respondent replied that he did not know (R. 189). He asked to look at the foot and he saw that it was *sore and inflamed between the toes* (R. 189-90). Respondent told him he had had the condition "for a long while" (R. 190).

First Assistant Engineer Guy said he first learned of it when, several days out of Philadelphia, he noticed that respondent had the top of his shoe cut out (R. 163). He said he never saw the foot (R. 164, 174), and respondent never told him anything about it (R. 163), nor about his having been to the Public Health Service (R. 164). Second Assistant Engineer Collins said the first he ever knew of it was three or four days before reaching the Canal when respondent told him his foot was "infected" (R. 178). He never saw the foot (R. 179), and respondent never mentioned having gone to the hospital (R. 178). Third Assistant Whitmore said that about three days out from Philadelphia (R. 246), while on watch, respondent told him he had an "infection" of his foot, and Whitmore suggested that he see the First Assistant (R. 240, 246).

Chief Officer Madison said that the first he knew of it was two days before reaching the Canal (R. 213). Third Officer Mulligan said respondent never told him anything about any injury to his foot, and he first learned of the infection about two or three days before reaching the Canal (R. 209-10).

After respondent was taken off the ship March 12 there was no serious conflict in what happened at the various hospitals at which he was treated. His subsequent treatment has already been reviewed.

Mr. Baron, a claims investigator for petitioner (R. 268), saw respondent at the Ellis Island Hospital in May, 1935 (R. 268, 273) and asked him for a history of the infection, and respondent said *he did not know* how it had occurred (R. 268). After that Baron saw respondent about once a week while he was at Ellis Island and at Stapleton (R. 269). On his first three or four visits they discussed possible causes of the infection, but respondent said that *he did not know* how it happened (R. 270-1). He told Baron that "the first symptom that he knew" was on the voyage from Baltimore to Philadelphia when he noticed "a little sore on the *inside* of his little toe" (R. 271). His only suggestion was that the "little sore" might have been caused by athlete's foot or some tropical germ (R. 271).

Baron said he saw him around 30 or 35 times between May 28, 1935, and March 10, 1936 (R. 269-70), but he never mentioned, or even intimated, anything about a traumatic injury (R. 271, 272). The first Baron ever heard of a claim that he had stubbed his toe on some retarders was from his attorneys on March 18, 1936 (R. 273).

Mr. Sommers, claims representative of petitioner, first saw respondent on August 22, 1935, at the Stapleton Hospital (R. 277, 279). Respondent told him he did not know the cause of his foot condition and had no means of knowing, but he suggested that it was possibly an infection from hot oil or something in the toilets or bathroom in the seamen's quarters of the *Losmar* (R. 278). He did not say anything about an accident, and never referred to his condition as anything other than an infection (R. 278).

Sommers saw respondent 15 or 20 times, mostly at petitioner's office (R. 279), the last time being on March 10, 1936 (R. 281). After that he heard nothing of respondent until he received a letter from his attorneys dated March 14, 1936 (R. 281). Sommers had never heard before then, from respondent or anyone else, that respondent had, or

claimed to have, sustained a traumatic injury on the *Losmar* (R. 282). Respondent had never mentioned to him that he had stubbed his toe, or that any lights had gone out (R. 283).

The Medical Testimony.

There was not complete unanimity of opinion among the medical experts, but their testimony was not in great conflict on the major points. They agreed that a trauma will not *cause* Buerger's disease (R. 80-1, 87, 118, 127, 133, 138), and the courts below so found (R. 309, 312, 329). They differed somewhat on the possible effect of a trauma on the disease, and they were in decided disagreement on whether respondent's infection was related to any trauma. In short, all the doctors based their opinions on the reported findings of the doctors at the various hospitals and the history of the case as disclosed by the hospital abstracts or as testified to by respondent himself. Their differences were largely due to the weight they gave to respondent's uncorroborated statements or to the findings and reports of the two hospitals where respondent was examined in February, 1935, and the three hospitals at which he was treated for about seven months.

The doctors all agreed that Buerger's disease is an inflammatory *disease* of the blood vessels the exact cause of which is unknown (R. 55-6, 80, 84, 117-8, 120, 133, 137). The nature and action of the disease, as testified to by the medical experts, were described by the Circuit Court of Appeals in the following language:

> "Buerger's disease is an obscure disease of the arteries and veins. It was defined in this case by Dr. Buerger, for whom it was named, as an inflammatory, morbid process of the arteries and veins. Inflammation takes place on the walls of these vessels, most often in the feet and legs. Coincident with this, extensive clotting appears, followed by a process of scar tissue replacement so that the affected arteries and

> veins are converted into hard fibrous parts, closing off the circulation of the members affected. This is followed subsequently by the secondary and visible effects, lesions, deteriorating changes and gangrene. The origin of the disease is not known and there is no known cure. The usual treatment consists of amputation of the affected parts and this often results in arresting the disease." R. 329.

Three doctors testified for respondent: Dr. Seltzer, 10 years in general practice, now specializing in internal medicine (R. 52-3); Dr. Kay, practicing 19 years, and also now specializing in internal medicine (R. 79); and Dr. Lowry, who has been practicing 10 years, specializing in surgery (R. 83).

Three doctors testified for petitioner: Dr. Buerger, who has been studying the disease for 32 years and has had thousands of cases under his observation and whose name the disease bears (R. 116-17); Dr. Spaulding, a practicing surgeon for 26 years (R. 131), and the only witness who actually examined respondent before the amputation of his leg (R. 47-8, 131); and Dr. Kramer, who has been in practice for 24 years and interested in the vascular diseases for 14 years, and who has contributed medical articles on arterial diseases (R. 137).

None of the doctors could find any evidence of a traumatic injury in any of the marine hospital abstracts (R. 78, 121-2, 135, 140). Although admitting that Buerger's disease is not caused by a trauma, respondent's doctors said that a trauma *could be* a precipitating or inciting agent that would account for the succeeding train of events (R. 55, 81, 87); but petitioner's doctors disagreed with that conclusion and said that the role of a trauma is really a moot question (R. 119, 127, 135). Petitioner's doctors, however, stated that there might be some relation of a trauma to the events that follow *if* the trauma were *at the very site* of a Buerger's disease manifestation which never healed (R. 130, 142-3). An abrasion,

bruise or cut on the top or side of the toe would have no relation to Buerger's disease manifested by a lesion between the toes (R. 142-3). Even if there had been a trauma which broke the skin at the very site of Buerger's disease manifestation (the lesion between the toes), and continued uninterruptedly, we believe respondent's witness, Dr. Kay, went as far as an expert reasonably could in explaining its effect as a precipitation of "a trend of events that would lead to the diagnosis of Buerger's disease" (R. 81).

The medical witnesses agreed that the real proof and basis of a diagnosis of Buerger's disease was the pathological findings in the marine hospital at Stapleton from a section of the artery removed from respondent's amputated leg (R. 55, 61, 84, 122, 138). This section was the only definite proof of Buerger's disease, but Dr. Buerger testified that it showed a condition of Buerger's disease of long standing,—long before February 9, 1935,—making this a case of prior Buerger's disease and subsequent trauma (R. 122, 125). Dr. Spaulding (R. 133) and Dr. Kramer (R. 138) also said that the pathological findings at Stapleton showed a Buerger's disease of years standing.

Dr. Buerger said that if a man had already had Buerger's disease, as the pathological findings showed respondent had, any subsequent trauma would be an independent thing, and there would not be any relation between the trauma and impaired nutrition of the tissues resulting from the Buerger's disease (R. 122-3). He testified that all the changes that took place in respondent's case, as shown by the clinical records, are characteristic changes that take place spontaneously in Buerger's disease (R. 123).

Concededly Buerger's disease is incurable, and none of the witnesses suggested that they could have given respondent a more complete cure than he had after his leg was amputated and he was discharged from the marine hospital. The evidence on which the Court based its award of mainte-

nance for life was the testimony of respondent's doctors that respondent should have medical supervision with periodic examinations and there might be a recurrence of the disease which would necessitate specialized care and perhaps further amputations.

Dr. Seltzer testified that respondent would need medical care for the rest of his life; that relapses are common in Buerger's disease and, in the event of a relapse, respondent might suffer pain or some disorder such as ulceration or gangrene; that in a number of cases other limbs become involved by the disease, requiring an amputation if gangrene sets in and becomes incurable; that if respondent should have a relapse he will require specialized care, and that his disease can prove fatal (R. 58).

Dr. Kay testified that respondent would need care for the rest of his life and if he should have a relapse, which is a common occurrence in the disease, he would likely need a further amputation; that if he had a relapse he would most likely need to be hospitalized again; and that Buerger's disease eventually proves fatal (R. 81).

Dr. Lowry testified that respondent would require medical supervision for the rest of his life; that relapses are common in the disease and, if respondent should have one, he might have gangrene which might require further amputation, and he might lose his life; that in the event of a relapse he would need specialized care to try to prevent the spread of the disease; and that in his opinion respondent should be examined periodically for the rest of his life, even if he does not show any indications of the disease (R. 86).

Dr. Kramer testified that he thought one who had had Buerger's disease should keep under observation and be seen about once a week, and perhaps later once a month (R. 143-4).

Not a single doctor from any of the hospitals where respondent was examined or treated was called as a witness, but, over petitioner's objection, the District Court admitted

the hospital abstracts without other proof (R. 90). Respondent was allowed to prove what was done for him at various hospitals by reports alone, without any opportunity for petitioner to cross-examine the persons who made those reports, or for the medical witnesses to have the benefit of the findings of the various doctors who had examined and treated respondent. Without those hearsay and unproved reports, respondent's medical witnesses would not have even known that he had Buerger's disease (R. 59-60, 77-8, 82-3, 84). Dr. Seltzer said that when he examined him, six or seven months after the leg amputation, respondent had shown no signs of active Buerger's disease of any consequence since leaving the hospital at Stapleton (R. 60). Dr. Kay said that he found no manifestations of Buerger's disease six months after the amputation, as they had all been taken care of by then (R. 82).

IV.

Specification of Errors.

The Circuit Court of Appeals erred in the following respects:

(1) In holding that respondent was entitled to maintenance and cure for life.

(2) In holding that respondent was entitled to maintenance after he was cured in so far as ordinary medical means extend.

(3) In holding that the duration of life is a reasonable time for the cure of a disease which the Court found to be incurable.

(4) In measuring a seaman's maintenance award by elements of damages, i. e., age, life expectancy, and earnings.

(5) In enlarging the implied maritime contract of petitioner and allowing respondent damages as maintenance and cure.

(6) In taking property without due process of law.

V.

Argument.

Summary of Argument.

The lower courts found that respondent became afflicted with Buerger's disease on the *Losmar* in February, 1935, but the credible medical evidence shows that he had the disease long before and it became manifest at that time. On September 6, his leg was amputated to remove the diseased parts and effect a cure, and nothing further could be done by medical science to effect a more complete cure. He was furnished free care and maintenance to October 3, 1935, when he was discharged from the hospital, and petitioner continued payments to him until March 10, 1936, after he was fitted for an artificial leg and had a reasonable time to get accustomed to it,—a year after he left the *Losmar* and petitioner's employ.

A complete cure of Buerger's disease being impossible, and there being testimony that respondent should have some medical supervision to watch any progress of the disease, and that he might at some indefinite future time need another amputation, the lower courts held that he was entitled to support for life based on his age, life expectancy and past earnings, without regard to his possible future earnings. This is a holding that petitioner contracted to pay respondent's maintenance until completely cured of an incurable disease, by death.

"Maintenance and cure" is a contractual obligation of the maritime law, but petitioner did not contract to maintain respondent for the rest of his life, nor after he was cured so far as possible at the Marine Hospital; and the $7,000 award of the courts below amounts to the taking of petitioner's property without due process of law. This decision is without legislative authority or judicial support, and creates a

dangerous precedent. It is petitioner's position that it paid respondent more than it had ever contracted to pay him and more than it was required to pay him by law, and that the decisions below are contrary to the maritime law for the following reasons:

(1) The obligation to pay maintenance and cure does not extend beyond a reasonable time to effect such cure as is within ordinary medical means.

(2) The courts below allowed respondent damages or compensation, without negligence on the part of petitioner, rather than reimbursement for actual expenses of maintenance under his seaman's contract.

FIRST POINT.

The obligation to pay maintenance and cure does not extend beyond a reasonable time to effect such cure as is within ordinary medical means.

The courts below found that there was no negligence on the part of petitioner contributing to respondent's ailment, and held that he was entitled to recover only maintenance and cure, a right peculiar to the Maritime Law which is not based on fault or negligence. The doctrine of maintenance and cure has no legislative origin in this country, but is a part of the common law of the sea. It is not confined to occupational diseases and injuries, but applies to any ailment of a seaman while in the service of his ship. The obligation of the shipowner to pay maintenance and cure is contractual, arising out of an implied provision in the seaman's contract of employment.

Pacific SS Co. v. *Peterson* (1928), 278 U. S. 130, 139;

Marshall v. *International Mercantile Marine Co.* (2 C. C. A., 1930), 39 F. (2d) 551, 553;
Cresci v. *Standard Fisheries, et al.* (D. C. Cal., 1925), 7 F. (2d) 378.

The shipowner's implied contract is not to furnish a complete cure whereby the seaman will never again need medical treatment or services, but is to furnish, or reimburse him for, the necessary expense of treatement to effect a cure, and his maintenance during the period of that treatment. As has been pointed out by so many courts, the word "cure" is understood to mean "care" by way of services and treatment with a view to effecting such cure as is reasonably possible by ordinary medical means and skill.

The Mars (3 C. C. A., 1907), 149 Fed. 729, 731;
Skolar v. *Lehigh Valley RR. Co.* (2 C. C. A., 1932), 60 F. (2d) 893, 895;
The Bouker No. 2 (2 C. C. A., 1917), 241 Fed. 831; cert. den. 245 U. S. 647;
Reed v. *Canfield,* 1 Sumn. 195;
The Pochasset (1 C. C. A., 1924), 295 Fed. 6;
The City of Alexandria (D. C. N. Y. 1883), 17 Fed. 390, 394;
Cortes v. *Baltimore Insular Line* (2 C. C. A., 1931), 52 F. (2d) 22, 23;
The Atlantic, Abb. Adm. 451.

In *The Mars, supra,* the Court said:

> "The word 'cure' is used in its original meaning of care, and means proper care of the injured seaman and *not a positive cure which may be impossible.*" (Italics ours.)

In the *Skolar* case, *supra,* the Court said:

> "But the shipowner's duty to give 'cure' to an injured seaman is only a duty to give proper care for a

reasonable time during which medical treatment *may be expected to effect a cure.*" (Italics ours.)

It is also well settled that the shipowner's obligation is only to see to it that the expense of such maintenance and care does not fall on the seaman. It is an obligation to furnish or reimburse. If the seaman has no expense, as when treated at a Marine Hospital, there is nothing to reimburse him for, and consequently no liability of the shipowner.

The Kenilworth (3 C. C. A., 1906), 144 Fed. 376, 378;
The Balsa (3 C. C. A., 1926), 10 F. (2d) 408;
The Santa Barbara (2 C. C. A., 1920), 263 Fed. 369, 371;
The Mars (D. C. Pa., 1906), 145 Fed. 446;
Fleischman v. *United States* (D. C. N. Y., 1934), 7 F. Supp. 373, 376;
Reed v. *Canfield* (C. C. Mass., 1832), 1 Sumn. 195, 202, Fed. Cas. No. 11641.

Ordinarily the obligation is fully met when the ship returns a seaman to the home port and has him entered in a Marine Hospital. There he has no expense, and the Marine Hospital will furnish him any required treatment so long as it is needed to effect a cure.

In this case respondent was furnished maintenance and medical care and treatment from the time he left the *Losmar* at the Panama Canal on March 12, 1935, until he was discharged from the Marine Hospital at Stapleton on October 3, 1935. Although he was furnished an artificial leg on January 15, 1936 (R. 30), respondent gave him a total of $487 up to March 10, 1936 (R. 295-303, 314, 315), when he voluntarily discontinued accepting such payments and placed the matter in his proctor's hands for litigation (R. 273, 281). When he left the Marine Hospital at Stapleton

on October 3, 1935 (Exh. L-4, 293-5), he had been cured in so far as that was medically possible.

While he was in Marine Hospitals he was maintained and cared for without expense. When he was not actually in a hospital, as on the voyage from the Canal to New York after leaving Gorgas Hospital, he was maintained by petitioner. His free care at Stapleton Hospital was also supplemented by Dr. Spaulding's examination at petitioner's expense. Even after he was cured as far as the doctors at the hospital could do so, petitioner maintained him until he received his artificial leg and became accustomed to it, and even then discontinued only because he stopped accepting it. As the District Judge said:

> "The record is barren of any evidence which would warrant a finding that the ship master or owners had shown any lack of consideration or feeling for the libellant when his affliction became known." R. 310.

It is an established fact in this case that nothing is due respondent for maintenance and cure prior to March 10, 1936, when he had been out of the hospital for five months, had his artificial leg about two months, and had voluntarily stopped accepting any payments from petitioner. The District Court found as a fact that petitioner met all its obligations up to that time (R. 314), and the only question in this case is one of law as to whether he is entitled to further maintenance after he has been properly cared for and treated until a reasonable time after medical science could do nothing further to cure him.

Originally it was thought by many admiralty judges that the right to maintenance and cure, being an incident to the service contract between the shipowner and the seaman, would last only so long as the contract and wage relationship continued, i. e., until the end of the voyage;

> *The Ben Flint* (D. C. Wisc., 1867), 1 Biss. 562, 568-9, Fed. Cas. No. 1299;

The J. F. Card (D. C. Mich., 1890), 43 Fed. 92;
The Tammerlane (D. C. Cal., 1891), 47 Fed. 822, 825;
Cornell Steamboat Co. v. *Fallon* (2 C. C. A. 1910), 179 Fed. 293, 294.

A very good review of the doctrine, as originally applied, appears in *The City of Alexandria* (D. C. N. Y. 1883), 17 Fed., 390, 394-5.

The leading case on the subject of maintenance and cure is *The Osceola* (1902), 189 U. S. 158, 175, where this Court said:

> "The vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

Later, however, following some of the early decisions, the courts generally took the view that maintenance and cure should not terminate immediately the voyage ended, but should continue for *a reasonable time thereafter.*

In *Chelentis* v. *Luckenbach S. S. Co.* (1918), 247 U. S. 372, 379, this Court quoted from the Circuit Court of Appeals opinion that

> "* * * a seaman * * * could recover * * * only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, * * *."

In *The Bouker No. 2* (2 C. C. A. 1917), 241 Fed. 831, 835, cert. den. 245 U. S. 647, the Court said:

> "We hold that * * * the duty of the ship and owner persists for a reasonable time after the termination of the voyage and wage relation. Of course, it must begin before such termination."

After extending the duration of the obligation, it became necessary to determine what a reasonable time after the end of the voyage would be. The measure uniformly applied was the time necessary to effect a cure so far as ordinary medical means extend, or the time during which medical treatment might be expected to effect a cure. Indeed, such a rule was approved as early as 1832 in *Reed* v. *Canfield*, 1 Sumn. 195, 202, Fed. Cas. No. 11641, where Judge STORY said:

> "The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, what expenses have been virtually incurred for the cure."

In *Skolar* v. *Lehigh Valley R. Co.* (2 C. C. A. 1932), 60 F. (2d) 893, 895, the Circuit Court of Appeals for the Second Circuit said that the shipowner's duty is only

> "to give proper care for a reasonable time during which medical treatment *may be expected to effect a cure.*" (Italics ours.)

The court below, in the decision now under review, recognized the authority of the case cited above, and summarized the law of maintenance and cure as follows:

> "The word 'cure' is used in its original meaning of care, and means proper care of the seaman and not a positive cure, which may be impossible. The Atlantic, Abb. Adm. 451, Fed. Cas. No. 620; The Mars, 149 Fed. 729. The duty is to furnish means of cure and to use all reasonable means for that purpose. Brown v. Overton, 1 Spr. 462, Fed. Cas. No. 2024. This obligation may continue after the voyage ends. Reed v.

> Canfield, 1 Sumn. 195, Fed. Cas. No. 11641; The Mars, supra; The Bouker No. 2, 241 Fed. 831, cert. den. sub. nom. Jones v. Bouker Contracting Co., 245 U. S. 647. The duty is to give proper care to the seaman for a reasonable time during which medical treatment may be expected to effect a cure. What is a reasonable time depends on the facts of each case. The Bouker No. 2, supra. The time may, however, extend beyond the time of the seaman's discharge from the hospital. Skolar v. Lehigh Valley R. Co., 60 Fed. (2d) 893.
>
> "As we have indicated, the libelant is suffering from an incurable disease contracted while in the service of respondent's vessel. This alone would not entitle him to maintenance and care by the respondent for life since the obligation of the latter ends when it has provided him with the ordinary means of cure which medical science affords." R. 329-30.

The Court conceded that petitioner's duty was only to see that respondent had proper *care "for a reasonable time* during which medical treatment *may be expected* to effect a cure," and that the incurable nature of his disease did not impose on petitioner an obligation to maintain him for life. While recognizing that petitioner's obligation "ends when it has provided him with the ordinary means of cure which medical science affords," the Court imposed on petitioner a new obligation to continue maintaining respondent after medical science had done all it could to cure him and nothing more could be expected to effect a cure. It did not hold petitioner liable until a more complete cure can be effected, but until death ends his malady.

Although a positive cure for Buerger's Disease is impossible, all the evidence in the case shows that respondent was cured so far as medical science is capable of effecting a cure when the amputation was made to get above the diseased parts of his leg. That was the very purpose of the operation. Medical science knows no more complete cure than "an amputation, above which the blood supply is good"

(Dr. Lowry, R. 84). Respondent's right to maintenance from petitioner did not extend beyond then,—certainly not beyond a reasonable time for him to get accustomed to the artificial leg which was furnished to him on January 15, 1936, nearly two months before he voluntarily stopped accepting payments from petitioner. Surely petitioner is not liable because the medical experts did not make a higher amputation, and none of the expert witnesses claimed that one would have effected a more complete cure. None of them said there was disease or bad blood above where the amputation was made at the hospital. None of the expert witnesses said that they or anyone else could do anything to effect more of a cure than was accomplished at the Marine Hospital. Respondent's witnesses admitted that they had never even given him any treatment.

Before this decision, no Court had ever measured the reasonable time for maintenance and cure by a seaman's life, nor held that maintenance and cure would extend until death because the disease was incurable or was progressive. On the other hand, there are any number of cases of sound reasoning and recognized authority, holding that there is no obligation to pay for life, nor for an indefinite period.

In *Raymond* v. *The Ella S. Thayer* (D. C. Cal., 1887), 40 Fed. 902, 904, "cure" was held to signify:

> "the ordinary medical assistance and treatment in cases of injury or acute disease, for a reasonable time. The ship is not bound to pay for his (the seaman's) medication, for the cure of a chronic disorder, for an indefinite length of time."

See also,

> *Skolar* v. *Lehigh Valley R. Co., supra;*
> *Meyer* v. *Dollar S. S. Line* (D. C. Wash., 1930), 43 F. (2d) 425, 426.

Indeed, the decision of the Court below is not only contrary to the decisions of all other courts in which the ques-

tion has been considered, but is in direct conflict with its own prior statement of the law in *The Kenilworth* (3 C. C. A., 1906), 144 Fed. 376, 378, where it said:

> "But if it be assumed that the liability in this instance continued after the completion of the voyage, yet the claim in question, as shown by the proofs * * * is for expenditures * * * which were made when the cure had been completed, at least so far as the ordinary medical means extend."

In the same case the District Court for the Eastern District of Pennsylvania (137 Fed. 1003, 1009) said:

> "So far as possible, indeed, it appears from the slender evidence on the subject that the libelant has already been cured in a certain sense. That is to say, while he is no doubt permanently injured, nothing further can be done for him by medical or surgical skill."

In *Eckert, Jr.* v. *Socony-Vacuum Oil Co.* (D. C. Pa.), 1937 A. M. C. 636, 639, District Judge DICKINSON, who had previously decided the instant case in the District Court, said in regard to maintenance and cure:

> "Logically, however, it ends with the end of the voyage. It has been extended however to include whatever is necessary to effect a cure. Here the libelant received hospital treatment and was discharged. Following this he settled in full for his cure and maintenance claim and executed a release. * * * Surely the ship's obligation ended. If it did not, it would never end."

Judge DICKINSON seems to have overlooked his prior decision in holding that this respondent's maintenance would never end until death, which we submit is contrary to the law, as it has been laid down by this Court and by all other courts. In this case the Courts below erroneously applied the word "cure", in its strict sense, and held that only death

could cure an incurable disease. This is in direct conflict with the great weight of authority, other courts having uniformly held that, in the phrase "maintenance and cure," it means *care for a reasonable time during which treatments are administered, and may be expected, to effect such cure as ordinary medical means afford.*

In *The C. S. Holmes* (D. C. Wash., 1913), 209 Fed. 970, 975, the Court said that the duty to effect a cure so far as possible by ordinary medical means

> "does not include * * * treatment which extends after a *cure has been as nearly effected as is possible* in a particular case." (Italics ours.)

In *The Pochasset* (1 C. C. A., 1924), 295 Fed. 6, 10, the Court held that the shipowner was not liable for maintenance and cure

> "because the evidence does not warrant a finding that a further operation would be reasonably likely to effect a cure or substantial improvement in the appellant's condition."

See also,

The Lizzie Frank (D. C. Ala., 1887), 31 Fed. 477, 480-1;

McCurron v. *Dominion Atlantic Ry. Co.* (D. C. Mass., 1905), 134 Fed. 762;

Peterson v. *The Chandos* (D. C. Ore., 1880), 4 Fed. 645;

The Mars (D. C. Pa., 1906), 145 Fed. 446.

The most that respondent's expert witnesses said was that Buerger's disease is an incurable disease (R. 57, 81, 85), and that relapses are common (R. 58, 81, 86), in which event gangrene *might* set in and *might* necessitate further amputation (R. 58, 81, 86). Dr. Kay said the disease "may remain dormant for a long period" (R. 81). They also tes-

tified that the disease might prove fatal to respondent (R. 58, 81, 86). Dr. Kramer, however, testified that the majority of cases get by without further amputations and do not prove fatal (R. 143-4).

Notwithstanding the fact that no medical experts testified that respondent's Buerger's disease would necessarily require further amputations, or prove fatal, the courts below found that the disease is a progressive one (R. 310, 313, 330), and the Circuit Court of Appeals said that it "is very *likely* to produce fresh manifestations in the future" and it *could not be said* that "the ordinary means which medical science affords for the treatment and care of this disease will be exhausted prior to his death" (R. 330). The same can be said of any incurable disease, and yet the courts below recognized that a shipowner is not obliged to maintain a seaman for life merely because he has an incurable disease. There is no basis for the conclusion that further treatment will effect a more complete cure of respondent's Buerger's disease. The District Court said that he was no more cured after the amputation of his leg than he was after the amputations of his toes (R. 313), but he was not discharged from active treatment after the earlier operations, and he was after the leg amputation had healed, and he continued without any further operation from September, 1935, up to the trial of this action, and probably ever since. His expert, Dr. Seltzer, said:

> "Since then he has showed no signs of any consequence so far as the active stage of Buerger's disease is concerned." R. 60.

The courts below confused possibilities and probabilities with established facts. They found that no cure had been effected because there was a *probability* of a recurrence or relapse, that the need for further amputation *might* occur, and petitioner *may* need maintenance and care for the rest of his life. As we pointed out above, there was no evidence

that further amputations would necessarily follow or that respondent would necessarily need to be maintained for life. His own expert, Dr. Kay, said that the disease might "remain dormant for a long period" (R. 81). There was no evidence of when in the future a relapse or amputation might be expected, and there was no evidence that in the meantime respondent could not earn his living, or any part of his maintenance. The decision presupposes, without any evidence to that effect, that respondent will always be helpless and unable to do anything for himself. If that were his actual condition, he would still be in the Marine Hospital. The fact that he should have periodic examinations does not negative his ability to earn his maintenance the rest of the time.

The courts having found by speculation that respondent *never could be cured,* they held petitioner under a legal obligation to pay the expenses of his care and maintenance *until a cure would be effected.* In other words, the courts below found that respondent's *only cure would be death,* and held that petitioner would have to support him until death occurred.

> "No case, I think, carries the doctrine of maintenance so far as this, and it is obvious that no such indefinite liability can properly be imposed upon the ship. * * * it might be equivalent to *support during life,* and even in a case of great hardship this would be out of the question." *The Kenilworth,* 137 Fed. 1003, 1009. (Italics ours.)

SECOND POINT.

The Courts below allowed respondent damages or compensation, without negligence on the part of petitioner, rather than reimbursement of actual expenses of maintenance under his seaman's contract.

The Circuit Court of Appeals approved the District Court's award of $7,000 for respondent's future maintenance and cure, saying that it was satisfied that the sum "is a reasonable present liquidation of what libellant's maintenance and cure *may be expected* to cost during the remainder of his life" (R. 331).

The Court did not point out the evidence which it thought supported the award, and there is no evidence that respondent will be unable to earn his maintenance expense, or any part of it, nor as to how long his life will last, or how much his necessary future maintenance or care will cost him. The District Court's opinion shows that the basis of the award was not the cost of maintenance, but respondent's age, estimated life expectancy, and last rate of earnings (R. 314). These are elements of *damages*, but not of maintenance and cure, and the Circuit Court of Appeals said that its award was "arrived at in exactly the same way as damages for the loss of future earnings are computed" (R. 331). An award of damages, based on a speculative life expectancy and earnings, cannot be made valid merely by calling it maintenance and cure.

The right to maintenance and cure does not include compensation for the effects of a disease. The shipowner's duty is only to maintain and care for the seaman for a reasonable time, or to repay him for any necessary expenses he has been put to in obtaining such maintenance and cure elsewhere. A money allowance is only for reimbursement of necessary expenses actually incurred by the seaman.

The Kenilworth **(3 C. C. A., 1906), 144 Fed. 376, 378, affirming 137 Fed. 1003;**

The Mars (D. C. Pa., 1906), 145 Fed. 446;
Reed v. *Canfield* (C. C. Mass., 1832), 1 Sumn. 195, 202, Fed. Cas. No. 11,641.

In *Cortes* v. *Baltimore Insular Line* (1932), 287 U. S. 367, 373-4, this Court said that failure to furnish maintenance and cure may amount to a tort, but the seaman's remedy, where it has been procured, is *for the outlay.*

The Circuit Court of Appeals recognized that the obligation is one of reimbursement (R. 331), but then approved an award based on elements of damage without evidence of future necessary expense. There can not be an award without evidence of the seaman's expenditures. *The West Irmo* (D. C. N. Y.), 1936 A. M. C. 614. When there are no such expenditures for maintenance or cure, there is nothing to reimburse, and no liability of the employer.

The Balsa (3 C. C. A., 1926), 10 F. (2d) 408;
The Santa Barbara (2 C. C. A., 1920), 263 Fed. 369, 371;
Fleischman v. *United States* (D. C. N. Y., 1934), 7 F. Supp. 373, 376.

The award to respondent was not to reimburse him, but to compensate him for something which was not caused or contributed to by petitioner, and which may or may not be attributable to his employment with petitioner. His ailment is not an occupational disease, and such compensation is not provided for by any contract or statute.

Respondent is not unable, so far as the evidence shows, to support himself. There are many men with an amputated leg who can, and do, earn their living. Petitioner is not required to support respondent merely because he prefers not to work. His medical witnesses testified that he should have medical supervision, but unless and until he has a relapse or recurrence, that will mean only periodical exam-

inations such as he was told to return to the Stapleton Hospital for, before he was fitted for his artificial leg. That will not prevent him from ever doing any work. The very doctors who said he would need such supervision examined him and found nothing requiring their treatment. As far as appears, he has only had periodic examinations since he left the hospital in October, 1935, and he has not required any treatment. He is not shown to have had any expense attributable to the disease for which he must be reimbursed.

If at some future time he should have a recurrence of the disease, he can be treated in the Marine Hospital, and then he will not have any expense of maintenance or care for which he will require reimbursement. The disease "may remain dormant for a long period" (R. 81), and during that period he will not require maintenance but should be able to support himself.

To allow as maintenance and cure expenses which a seaman may or may not have to pay, depending on the future course of his disease and the length of his life, is to allow damages, which are recoverable only in case of the shipowner's negligence, or workmen's compensation which requires statutory authority. There is no implied agreement in the service contract to pay workmen's compensation. The District Court treated maintenance and cure as similar to, and as extensive as, statutory workmen's compensation (R. 312), and the Circuit Court of Appeals approved its award of compensation as maintenance and cure. There is no seamen's compensation act, and to judicially legislate compensation to seamen as a right additional and alternative to the right of indemnity damages for unseaworthiness or for negligence of the owner, officers or fellow members of the crew of the steamship, under the Merchant Marine Act, 1920, and the recognized right of maintenance and cure, is to grant to seamen far greater privileges than are accorded any other workmen, and to impose upon shipowners burdens too heavy to be borne.

If there were a seamen's compensation act (which has been opposed by the seamen themselves), the owner's liability under it, if like other such acts, would be exclusive. The workmen under such an act cannot demand both compensation and damages. In this case, however, respondent was allowed to sue for damages and maintenance and cure and to recover compensation equivalent to support for life, and that for a disease not directly related to his employment.

The danger in such an extension of the doctrine of maintenance and cure can readily be seen when it is remembered that seamen's actions are not decided by a commission and not always by an admiralty court, but are usually tried before a jury. Under such a decision a jury can find that a shipowner is liable either in damages for negligence, or for maintenance so long as a complete cure is not effected. It can allow support for life in any case of an incurable disease, for no one can say that there can not be a recurrence in any disease that has not been completely cured.

In this case the Court allowed a lump sum which it thought would support respondent for life, rather than reimbursement of expenses incurred. It conceded that the award was only "an approximation and may in fact turn out to be more or less than the amount actually required" (R. 331). Surely that is not maintenance and cure if it turns out to be more than required. Respondent's medical experts said his disease might prove fatal (R. 58, 81, 86). If he should recover the $7,000 awarded to him by the courts below, and die shortly thereafter, it is clear that the greater part of that award would not be reimbursement of expenses, but would be *damages*. The award is an allowance of what, in large part, will be pure damages if respondent's disease proves fatal, as his experts testified.

> "Sickness * * * may occasion * * * permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred * * *. They are not in any

just sense liable for consequential damages * * *." Story, J., quoted by this Court in *The Osceola, supra*, page 172.

Conclusion.

Respondent was maintained and treated at a hospital in the Canal Zone and then returned to his home and admitted into marine hospitals where he was cared for and treated until he was cured so far as a cure was possible within the power of medical science. Even after such cure, extending over a period of seven months, petitioner continued to pay him maintenance for five months, more than a reasonable time for him to recover from his amputation and become accustomed to his artificial leg. In all, he was treated seven months and maintained a year, more than a reasonable time after he left petitioner's employ. Petitioner has willingly paid him more than it was obligated to under its implied contract or by the Maritime Law.

The Court below, however, erroneously held that petitioner's contract obligation will never end until respondent's death, notwithstanding the fact that nothing can be done to give him a more complete cure. Such a holding is contrary to the law, and the award to respondent amounts to a taking of property without due process, and should be reversed with instructions to dismiss the libel.

Respectfully submitted,

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